90-81

No. . . . .

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner/Appellant

V.

JEFFREY G. BANKS, ET AL.
Defendants

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

APPELLANT APPENDIX "A - 3" DISTRICT COURT ACCOUNTING FINDINGS AND FINAL JUDGMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
CASCADE V. BANKS.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS, ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ACCOUNTING AND RELATED PHASES OF CASE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION IN CASCADE V. BANKS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
No. C-82-1223C

CASCADE ENERGY AND METALS CORPORATION, a Nevada corporation,

Plaintiff,

v.

JEFFERY G. BANKS, et al,

Defendants

JEFFERY G. BANKS, ET AL,

Counterclaimants, Cross-laimants, and
Cross-Counterdefendants,

vs.

CASCADE ENERGY-AND METALS CORP.,

Counterdefendant and
Cross-Counterclaimant,

and

W. DAVID WESTON, ET AL,

Cross-Counterclaimants
and Cross -Defendants.

CHRISTENSEN, J.

The Amended Interlocutory Findings of Fact and Conclusions of Law on the trial proper were filed on April 3, 1985, and based thereon an Interlocutory Judgment was filed on April 15, 1985. Reserved for further determination by the Court were the issues of the accounting ordered to be rendered herein; the damages or sums, if any, to be recovered by any party; the amount of attorney's fees to be awarded the Defendant Associates by virtue of the bad faith in bringing the principal complaint by plaintiff Cascade

Energy and Metals Corporation (Cascade), W. David Weston (Weston) and/or other related entities; whether the facts and circumstances of the case require, in the interests of justice, that the separate corporate-or formal legal entities of plaintiff Cascade, and the cross-defendants and counter-defendants Rex Montis Silver Company (Rex Montis), Telegraph Mine Limited, Weston, and Gnolaum Unitrust be disregarded and each held liable for the debts ;and liability of the others under the final judgment to be rendered herein, and terminal findings and conclusions to further complete the basis for a final judgment in this litigation.

On August 5, 1985, this action came on for hearing of the issues reserved by the Interlocutory Judgment. Evidence was presented on August 5, 6 and 7, 1985, and on August 7, 1985, the matter was argued and submitted for decision.

Now deeming itself to be fully advised, the Court makes and enters the following:

FINDINGS OF FACT ON RESERVED ISSUES

1. All findings of fact set forth in the Amended Interlocutory Findings of Fact and Conclusions of Law filed April 3, 1985, are hereby adopted and confirmed by the Court as part of its final disposition, as supplemented and amended by the present findings and conclusions which to the extent, if any, inconsistent with the original amended findings shall be deemed controlling.

2. Counsel for the Defendant Associates have submitted proof by affidavit of the time devoted to the defense of plain-tiff's claims. The Court has observed the nature and extent of the services of counsel in the various phases of the litigation, and in the light of the proof is in a position to form a reasonable judgment concerning the legal services properly assignable to the defense of the meritless and bad-faith

claims against the Associates. It has no reason to question the total billings, rates of billings and reasonableness of billings submitted by counsel but yet believes it should take into consideration also in any allocations the time and efforts devoted to other matters to the extent not considered by counsel in their own computations and time unreasonably devoted to efforts to sustain unwarranted positions. In consideration of such matters, weighed in the light of time spent, reasonable rates of compensation for time spent, the nature of the responsibilities involved, and all other considerations having bearing upon the reasonableness of the award of attorney's fees under the circumstances, the Court has determined that reasonable awards to be made for attorney's fees are as hereinafter provided.

3. The defendants Waugh, Moses, Harmatz and Hodowski are limited partners in Gold Technics, Ltd. and are also Associates. These defendants were required to defend themselves against the main action brought and maintained in bad faith by Cascade and Weston, and they reasonably incurred attorney's fees, costs and expenses attributable to that defense in the amount of $25,000.00.

4. The other Defendant Associates have incurred attorney's fees, costs and expenses of $240,000.00 reasonably attributable to the defense of the action brought in bad faith by Weston and Cascade.

5. Cascade is the general partner of Telegraph Mine Limited, a member of the Telegraph Joint Venture, and the operating manager of the Telegraph Joint Venture and Telegraph Mining Associates. Cascade owed to them a fiduciary duty of fairness, full and complete disclosure, and an honest accountability as to funds, equipment and monies of the Telegraph Mine Joint Venture and funds held in trust and expended by it with respect to the $800,000.00 development loan.

6. Rex Montis is a member of the Telegraph Joint

Venture, is the general partner of Gold Technics, Ltd., and owed a fiduciary duty to them of fairness, full and complete disclosure and honest accountability as to assets and money of the joint venture and the partnership, and the duty to avoid taking any improper actions injurious or detrimental to the interests of the joint venture, the partnership or to its limited partners.

7. Weston, as a controlling shareholder, director and officer of Cascade, Rex Montis, Interphase, Telegraph Mine Limited and the Gnolaum Unitrust, is the alter ego of those entities, as they have been and are of him, and owed a fiduciary duty to the Telegraph Joint Venture, the Telegraph Mine Associates, and Gold Technics, Ltd. for a full and complete accounting of money and assets which came within his possession or control, and in the handling, allocation, and accounting for funds, Weston exercised full direction, supervision and control.

8. In keeping accounts for the purposes of the organizations and entities of which he was in control, or purported to be acting for, Weston involved the services of Calvin Griffiths, audited in part by Joel Harrison, C.P.A., and reviewed generally in preparing for the accounting hearing but not audited by J. Brent Kartchner, C.P.A. With respect to allocations to particular accounts or characterizations of transactions in his final accounting report to the Court, Weston exercised control and apparently did most of the meaningful work himself. Weston claimed that Hodowski and Stoltenberg reviewed a part of the accounting records in connection with their services for the Associates' Management Committees and thus 'accepted' them. The Court finds in this connection that there was no acceptance of any of the Weston records as sufficient for the purposes of a final fiduciary accounting and that any acquiescence in them by the parties directly or through the Management Committees was upon only hasty and fragmentary study in

light of the extent and complexity of those records and was further complicated by Weston's manipulations and failures of disclosures, and did not operate in any sense as an estoppel or bar to the right of opposing parties to a full, true, and correct fiduciary accounting in these proceedings. The Court further finds that examinations of a portion of those records by certified public accountants and their reports concerning them did not persuasively support the accuracy of matters hereinafter determined not to have been sufficiently accounted for since the depended largely upon allocations and directions arbitrarily and improperly made by Weston, often without documentation, rather than the facial sufficiency of the accounting system employed and the 'balancing' of entries in connection with that system.

9. Interphase Corporation was employed to maintain the accounting records under Weston's direction and supervision during the operative period. The records were kept in a double entry system of accounting where each accounting entry generally was balanced in the accounting equation so that the asset accounts as posted equaled the liabilities and ownership equities accounts; each transaction was electronically posted utilizing a Tandy Corporation computer software accounting package. The accounting transactions in most instances were journalized chronologically by the computerized system of accounting which automatically collected the journal entries into the system of ledger accounts, subject to reallocation or different treatment as Weston might later direct. Supporting invoices, checks and other documents were cross-referenced to the subsidiary ledgers in a manner which usually provided for access and identification, hut characterizations, allocations or reallocations frequently were undocumented and depended upon the oral direction of Mr. Weston. Extensive transactions over the course of years and involving the businesses of the Associates, the joint venture, Telegraph Mine Limited, In-

terphase, the Gnolaum Trust, as well as Cascade, were for the most part handled through a single bank account of commingled funds. It was and is impossible to trace individual dollars from source to use.

10. The accounts and accounting involved here are so voluminous, convoluted and complex as likely to have required months of work by accounting experts and the expenditure of unacceptable sums of money to fully evaluate and determine the accuracy of the accounting submitted herein, if this could ever be accomplished. In an effort to concentrate upon items that might be most questionable, the parties stipulated that Weston would submit in advance of the accounting hearing a written accounting according to his claim of an adequate fiduciary accounting and that opposing parties would submit a statement of their questions and concerns, to be followed by Weston's responses thereto, item by item. The Gold Technics Defendants have argued that Weston's entire system of accounting is inadequate as a fiduciary accounting. However, the approach upon which the parties have at least tacitly agreed, the proposed findings submitted by the parties concerning the accounting, and the practicalities of the situation in view of the record before me, have led me to find that the system utilized is not in general suspect so as to authorize its rejection as any basis for a fiduciary accounting, and to find that the day by day records of operations and their accounting are substantially accurate except for those items, areas or matters as to which I make specific findings to the contrary herein or which relate to those findings. On the other hand, I have considered the uncertainties and defects with respect to the accounting otherwise and have reached the considered judgment that there are no credits or other items in other areas of the accounting which negate or reduce the balances found due to the Associates and the Gold Technics Defendants from a consideration of the specific items which they

have questioned, and I so find.

11. Prior to December 31, 1982, the Defendant Associates actually paid 'assessments' to Weston and Cascade for which they were not obligated as follows:

Herbert W. Stoltenberg	3,400.00
Jeffery G. Banks	1,000.00
Roger A. Mann	2,000.00
David G. Henry	4,200.00
Delford Ashley	20,421.12
George and Patricia Slater	2,307.75
Robert Doub	9,231.00
Sam and Alyce Hambarian	9,258.31
Peter P. Samarin	5,000.00
Lionel Ascher	4,615.50
Harmatz & Hodowski	4,500.00
Chris Waugh	4,516.00
	$70,449.68

12. The Court has already found the assessments were not due, and were collected in bad faith by Weston and Cascade. Accordingly, judgment with interest from December 31, 1982, at the rate of 10% per annum should be entered in favor of the respective payers. No deductions should be made for expenses allegedly incurred by Cascade on the strength of Management Committee directives for the reasons hereinafter indicated.

13. Cascade did not incur any additional significant expenses because of the Associates' Management Committee directives which would not have been incurred in their absence. In fact, the Committee likely reduced expenses to the benefit of Cascade itself, in view of the absence of any persuasive showing that the mine could have been profitably operated in any event. Moreover, the intervention of the Management Committee itself was induced and justified by

violations of the fiduciary duties of Weston and Cascade and their lack of candor and good faith as before found.

14. The fiduciary accounting prepared by Weston and Cascade attributing $159,776.13, including all of the operating expenses of the mine for the months of October, November and December of 1982, to the Management Committee and the Associates, was not prepared and submitted in good faith and sought to enlarge an improperly induced and limited assumption of extra expense into a carte blanche assumption of all-inclusive expense. The Management Committee Resolution provided "It is expressly agreed that any costs incurred by the Operating Manager in complying with any special requests of the Management Committee shall be born [sic] proportionally by the Associates." On November 12, 1982, Weston wrote to the Committee (Exhibit 118), quoting this wording and enclosing a "current billing in the amount of $3,186.50" in accordance with the resolution. No other or further charge was made for or attributed to 'special requests' prior to this litigation.

15. Having been relieved from payment of their development loan notes, the Defendant Associates are not interested in, nor have they sought, an accounting of the expenditure of the development fund. Hence, the Court has not further considered as to them the sufficiency or insufficiency of the fiduciary accounting concerning the expenditure of the development fund, However, the Court has not been able to avoid the clear implication of a related consideration arising from the bad-faith claim asserted in the fiduciary accounting as last mentioned and in the testimony of Weston at the accounting hearing with respect thereto.

16. Weston testified in attempted justification of his accounting and particularly his 'assessments' following the appointment of the last Management Committee that they were made in sole reliance upon the Associates' contract

through that committee, not by virtue of any obligation of the Associates under the terms of the Joint Operating Agreement. The limited written undertaking of the Management Committee has already been noted and the Court is aware that during the initial trial Weston asserted that members of the Management Committee had undertaken to assist in collecting the assessments which Weston claimed were being levied by virtue of the terms of the Joint Operating Agreement. The adroit manner in which Weston in the last stage of the litigation seized upon and distorted these circumstances to avoid the impact of my ruling that there was no such right of assessment was impressive. By thus putting aside his formerly intransigent position that his 'assessments' were levied on the basis of the terms of the Operating Agreement, and disregarding the pleading, pretrial order and testimonial record up to the time of his purported final accounting with a semblance of plausibility, he rendered it increasingly manifest to the Court that here was an able person who would be especially persuasive to business associates trying to monitor their investments from a distance and hopeful for profits from their association, but without benefit of the full adversarial presentation that has been available to the Court.

17. This perception has thrown additional light upon the matter of the development loan so importantly involved in the accounting in light of the other circumstances of the case, and upon the timing of Weston's realization that his production projections and the feasibility of his plan for developing the mine were fallacious. My interlocutory findings determined that obviously at some point Weston had concluded that production would depend not upon profits to be immediately generated from the property but upon subsidizing the cost of further development and production through his "assessments." His letter of July 28, 1981, to the Associates recommending diversion of

development funds "to surface mining and heap leaching of the surface ores, and that the early profits "scalped" from this operation be used to suppliment [sic] the pre-development loan funds to assure the continuing full development of the shaft and underground mining operations," marked that point. It bears clear indication, in light of developing circumstances, not only of a realization that underground mining at a profit would be impossible from expenditure of the development loan and interest, but that as early as July 1981 he was laying the foundation for his later explicated theory that the "development loan fund" was actually not intended by the parties as such but only as 'pre-development loan fund,' with the Associates being required to provide through assessments whatever additional funds were necessary for development or "pre-production" expenses.

18. Adhering to my interlocutory findings concerning the good faith of Weston in connection with the original offering in reliance upon the existing reports of geologists and his analysis of and projections from them as to underground operations, I am now clearly convinced that Weston's bad-faith conduct had its inception on or prior to the writing of July 28, 1981, and that a breach of Cascade's implied covenant of fair and honest dealing as a fiduciary toward the Associates continued from that time to and including the institution of the present action as described more particularly in my interlocutory findings.

19. The Gold Technics Defendants having amply sustained their burden of proving their right to an accounting, Cascade, Rex Montis and Weston had the burden of proving the validity and accuracy of their fiduciary accountings particularly with respect to the items or areas reasonably questioned by the opposing parties. Whether, and to the extent, if any, they have met this burden must be determined not only upon the basis of the financial statements, declarations, invoices, documents, printouts, ledgers, journals, and other

formal or facial matters submitted or covered by the evidence, but in the light of all surrounding facts and circumstances under which the accounting and financial data were entered, prepared or modified, including the facts that the December 31, 1982, financial statements for the various entities were prepared only after an adversary relationship developed and the filing of this and other civil suits; the fiduciary accounts recently submitted vary in significant respects from the prior annual, "audited" and interim financial statements prepared by Cascade and Weston; Cascade's practice of commingling fiduciary funds with its own funds in a general account which made it impossible in many instances to trace money from its source to its ultimate use; Cascade's practice of freely transferring funds to itself or related entities "on account," and then "accounting" for these funds as an account payable by Cascade, with a corresponding account receivable from the entity whose funds were transferred, rendering it difficult as to any particular item to determine whether the transfer was for a legitimate use of fiduciary funds or some other purpose; Cascade's practice of preparing Cascade invoices for expenditures after the transfer of funds; and serious questions concerning the credibility of Weston and particularly his propensity at a given time to rationalize his conduct and position in disregard of prior circumstances, actions and intentions as they had existed or occurred theretofore.

20. It was Cascade's practice to withdraw and deposit in Cascade's general account, fiduciary funds "on account" in large, even-numbered checks, to commingle the deposited funds with those of its own, the Telegraph Mining Associates, and the Telegraph Joint Venture, and subsequent to those deposits later attempt to account for or attribute them to undocumented pre-intentions or to invoices Cascade or Weston caused to be prepared to indicate where, how or for what purpose the monies were spent.

21. It was only after the commencement of this litigation that Cascade/Interphase/Weston prepared the December 31, 1982, financial statements. The Telegraph Joint Venture financial statements, together with the Gold Technics, Ltd, statements on that date, were not sent until August 1983. Those statements claimed, for the first time, a purported obligation to Downey Bank of $95,000.00 and to Zion's Bank of $165,000.00 by the Telegraph Joint Venture. There were no December 31, 1982, financial statements for Telegraph Mining Associates prepared or submitted at that time.

22. With respect to the conflict of interest positions of Weston and the companies under his control, Weston has sought to make the point both in his accounting and in other connections that all of the parties concerned were aware from the beginning of the convoluted nature of his control and assumed the risk. Indeed, even under the circumstances prior to the establishment of his overreaching, the spectacle of Weston's signing an agreement as officer for the managing agent of one entity with himself as managing partner or agent of another, appeared remarkable although not on its face legally infeasible. But such initially approved or accepted conflict of interest and activities when the violation of fiduciary duties has been established cannot change the law or the obligations of any party to comply with considerations of good faith, fair dealing and candor in the discharge of fiduciary duties nor alter or relax the rules and requirements for a fiduciary accounting.

23. Thus, while there are innumerable transactions to which exception has not been taken that were accomplished under conflict of interest or other circumstances presenting problems in general, others in particular on their face are highly suspect by reason of conflicts of interest, or self-serving treatment by Weston after the commencement of this litigation and in important instances even after the trial of

the primary issues had been completed and I had filed my interlocutory findings of fact, conclusions of law and judgment. To hold Weston and the companies under his control to the usual rules concerning the sufficiency of fiduciary accounting and to the consequences of substantial insufficiencies thereof with respect to specific matters to which exception has been taken and as to which inadequacies have been established is appropriate despite the wide discretion with which the parties initially invested him. These observations bear upon findings concerning applications of the alter ego doctrine to be considered later, as well as to the accounting itself as it relates to the interest of the Telegraph Mine Joint Venture and the Gold Technics Defendants which will now be considered more particularly in order.

24. Cascade has attempted to account to the joint venture for cash receipts totaling $2,100,000.00 in lease or royalty payments, together with interest income of $10,319.22, from the sale of the thirty-five Telegraph Mine leasehold interests to the Telegraph Mining Associates at $60,000.00 cash per unit. The sum of $1,841,682.30 was reportedly received by Cascade in 1981, $260,319.00 in 1982 as the result of payments in that year from Associate unit purchases. The sum of $165,000.00 was reportedly paid by Cascade and Interphase in the latter year for the purchase of 5 1/2 units of the Telegraph Mining Associates for which there were no checks or sources of funds identified for the payment; $95,319.00 represented cash received from other Associates. Receipts in 1982 did not include an additional $30,000.00 to be received by the Telegraph Joint Venture in 1982 from Resource Concepts, a Weston entity, for the purchase that year of the 'Glick' unit. Of the total amount received, $800,000.00 was loaned by the Telegraph Joint Venture to the Telegraph Mining Associates in January 1981.

21[sic]. On February 3, 1982, Cascade, on its own behalf,

obtained a $205,000.00 line of credit with Downey Bank, secured with equipment which it attributed to itself. This loan was disbursed to Cascade, for its own purposes. The June 30, 1982, financial statements of the Telegraph Joint Venture do not show the joint venture's owing any part of the Downey loan, nor any portion of a Zion's Bank loan of $245,000.00 obtained by Cascade in May or June, 1982. In correspondence with the Associates in 1982, Cascade stated that it and Weston alone had advanced sums of money to meet the expenses of the Associates' operations; there was no reference to the Telegraph Joint Venture borrowing or obtaining the loans on behalf of the Associates.

22[sic]. The Gold Technics Defendants' claim $285,363.42 as funds unaccounted for out of the $800,000.00 development loan. While the Court believes there are defects in Cascade's accounting in this respect, it finds that any inadequacy is not significant and need not he recognized in view of funds substantially in excess of the questioned expenditures from the development fund with which Weston and his associated interests to be responsible as individual advances without right of reimbursement from Gold Technics, Ltd., the Associates, or the joint venture. Nor, on the other hand, have I permitted these individual advances to reduce the amounts which I have found Weston and his affiliated interests must account to the joint venture or Gold Technics, Ltd.

23[sic]. The purported accounting rendered by Cascade and Weston and their subsequent affidavits and explanations are wholly inadequate and do not account to the Telegraph Joint Venture for the following sums:

(a) The sum of $36,943.73 claimed as cash deduction for "depreciation," which was improperly used as a deduction expense for cash received.

(b) The sum of $335,722.90 for money Cascade had transferred and used as of December 31, 1981, and has not

accounted for, or replaced, from the Telegraph Joint Venture funds, which is reflected on Cascade's books and records as liabilities to the following entities:

2105 Interphase N/P	$30,681.89
2107 Telegraph Joint Venture N/P	$305,041.01

(c) The sum of $81,308.00 for Cascade's unwarranted, unjustified transfer from Telegraph Joint Venture funds to Interphase Corporation, which was not repaid.

(d) The sum of $165,000.00 for investment in 5 1/2 Associate units, not paid.

(e) The sum of $10,500.00 which was transferred to Rex Montis and not repaid.

24[sic]. The Gold Technics' additional claim for an allegedly improper credit asserted by Weston totals $28,373.99 and is comprised of the $16,534.97 for 'offering exp. Williams' and $12,839.02 for "legal & accounting". This is questioned by the Gold Technics Defendants on the ground that the Joint Venture Management Agreement specifically provided that an additional $800.00 per unit sold in the Telegraph Mining Associates' offering (800 units x 35 = $28,000.00) was to pay for legal and accounting expenses in and prior to the offering. However, reading the Joint Venture Management Agreement in pari materia With the Joint Operating Agreement and the notes to Weston's projections, I find that the legal and accounting expense allocation out of joint venture funds was justified.

25. There has been no distribution of capital to Gold Technics, Ld. or the Gold Technics Defendants, and the attempt by Cascade, Rex Montis and Weston, as fiduciaries, to justify their failure to account for the foregoing charges on the theory of 'capital distributions' is an improper and self-serving attempt to avoid accountability for the balances they owe as above specified.

26. Based upon the foregoing, Cascade and Weston have not accounted for, paid or repaid at least $629,474.63

to the Telegraph Joint Venture after the allowance of all offsets, balancing items and justifications that are established by the record.

27. There has been a complete and irremedial breakdown in the relationship between Gold Technics, Ltd. on the one hand and Cascade, Rex Montis, Weston and his related entities on the other with respect to the joint venture. The purpose of that venture as far as the interest and participation of Gold Technics, Ltd. is concerned, has been frustrated, obstructed, and rendered impracticable and futile by the unlawful and improper conduct of the other members of the joint venture and of Weston, the joint venture thereby has been terminated de facto as far as Gold Technics, Ltd. is concerned and the latter should be relieved from further participation and responsibility with respect to the joint venture. In the absence of substantial evidence as to the amount of damages thereby caused to Gold Technics, Ltd., and by reason of the mounting indications that success of the joint venture and its value otherwise have been uncertain if not highly speculative from its relatively early stages, nominal damages in the sum of $5,000.00 only should be awarded to Gold Technics, Ltd. in this accounting.

28. Now, as to the accounting of Rex Montis directly to Gold Technics, Ltd,, the Court finds that in June, 1983, Rex Montis and Weston, as the general partner and a fiduciary to Gold Technics, Ltd., transferred and released 38,000 shares of the 480,000 shares of Rex Montis stock, which it held in trust for and never delivered to the Gold Technics, Ltd. under the September 1980 sale agreement, as collateral for the Cascade-Downey Bank loan. The bank then sold the stock and credited Cascade's loan account in the amount of $18,620.00. Cascade, Rex Montis and Weston converted the Gold Technics, Ltd. stock for the purposes Cascade's loan without right or justification.

29. Gold Technics, Ltd. purchased its initial interest in

the Telegraph Mine under an agreement dated January 24, 1979, which provided for a total purchase price of $150,000.00, payable $50,000.00 down with $100,000.00 paid in eight equal annual installments, interest at 9 3/4%, with an option to accelerate remaining amounts "... by the greater of either the annual installment or thirty percent of all amounts received by the Buyer as a result of its interest in the 1ease...."

30. Gold Technics did not receive any profit by reason of its lease interest in the Telegraph Mine. Weston testified that in May or June of 1985 he transferred the Telegraph Mine lease to a third party without notice to the Gold Technics Defendants. Gold Technics, Ltd. paid to Telegraph Mine Limited $75,000.00, plus interest, for all payments due as of January 24, 1981. By reason of the circumstances found here in, and particularly because of the breaches of fiduciary duty owing to the joint venture and to Gold Technics, Ltd. which frustrated the purposes of the joint venture as aforesaid, there has been a partial failure of consideration with respect to said obligation which in equity and good conscience should relieve Gold Technics, Ltd. from payment or accountability for the balance.

31. Cascade claims that the Associates obtaine an injunction in California litigation by which it was foreclosed from operating the Telegraph Mine for a period to its damage. The Court finds, by reason of the limited restrictions of that injunction and failure of proof, that it suffered no damage as a result thereof to offset in whole or in part the amounts awarded to the Associates or to Gold Technics, Ltd.

32. Thus, on this accounting by Rex Montis to Gold Technics, Ltd. directly there is owing to the latter the sum of $18,620.00, after credit has been allowed to Rex Montis and all other alter ego entities for whatever offsets, balancing items or 'justification are established in the record.

33. As to the other claims of the Associates and the Gold Technics Defendants in this accounting, the Court finds that they have not been sustained and that the accounting of Weston and his alter ego entities has been, if not satisfactory in general, at least materially sufficient except as to its insufficiency and ineffectiveness to explain or justify any deductions or offsets to the balances found due herein, so that upon the payment of said balances and the other awards herein a settlement shall have been accomplished among the parties, saving only rights of the Gold Technics Defendants as stockholders of Rex Montis and as partners in the limited partnership of Gold Technics, Ltd.

34. I have allowed prejudgment interest on the refund of improperly collected assessments since the entitlement thereto is clear, the accounting between the Associates and the opposing parties uncomplicated in view of any other findings, and the amounts and times of accrual are certain. Except for this inclusion, I find that it would be inequitable and improper to allow prejudgment interest on any other balances. As to them, the times of the accrual of amounts found due is difficult to determine in view of varying positions and equities. The plaintiff, Weston and associated companies have been held to the risk of various advances they made, notwithstanding prospective although illusionary benefit to the joint venture, on the hope of reimbursement from the unlawful "assessments." In a sense the Gold Technics, Ltd. as joint venturer and the other Gold Technics Defendants were represented by Weston and stood to gain from some of his conduct in that representation although they were not in pari delicto. Considering these and other circumstances, I do not find it appropriate to award prejudgment interest on balances owing to them and exercise my considered discretion in denying it.

35. Interphase, Gold Technics, Telegraph Mine, Ltd., Telegraph Mine Joint Venture, Cascade and Rex Montis are

instrumentalities of Weston which were and are used by Weston for his own personal purposes. Weston disregarded the purported separateness of the entities and commingled the funds of the entities and his own. He dominated their boards of directors and management, and has been and is able to single-handedly transfer assets from one entity to another and to and from himself as he chooses, with the acquiescence and consent of all. It would be inequitable and a fraud on the opposing parties if any judgment against Weston, Cascade, or Rex Montis were not also against these alter ego entities. Accordingly, the judgments to be awarded herein for balances due, restitution, damages and costs and attorney's fees should run not only against Cascade and Weston but against Interphase, Telegraph Mine Limited, Rex Montis and Gnolaum Unitrust. From the foregoing Findings of Fact, the Court now makes and enters the following Conclusions of Law (to be deemed also Findings of Fact to the extent partaking of the nature of such).

CONCLUSIONS OF LAW

1. The interlocutory amended conclusions of law filed on April 3, 1985, along with the interlocutory amended findings of fact, are hereby confirmed and adopted for the Court's final conclusions of law as supplemented hereby,

2. The Defendant Associates, except Harmatz, Hadowski, Waugh and Moses, are entitled to judgment in their favor jointly and severally in the sum of $240,000.00 as attorney's fees, costs and expenses reasonably incurred by them in defending the bad-faith action of Weston and Cascade.

3. Defendants Harmatz, Hadowski, Waugh and Moses are entitled to judgment in their favor jointly and severally in the sum of $25,000.00 as attorney's fees, costs and expen-

ses reasonably incurred by them in defending the bad-faith action brought by Weston and Cascade against them in their capacity of Associates.

4. The following Defendant Associates are entitled to judgment in their favor for assessments theretofore paid by them to Cascade severally in the following amounts: Herbert W. Stoltenberg, $3,400.00; Jeffery G. Banks, $1,000.00; Roger A. Mann, $2,000,00; David G. Henry, $4,200.00; Delford Ashley, $20,421.12; George and Patricia Slater, $2,307.75; Robert Doub, $9,231.00; Sam and Alyce Hambarian, $9,258.31; Peter P. Samarin, $5,000.00; Lionel Archer, $4,615.50; Harmatz and Hadowski, $4,500.00; Chris Waugh, $4,516.00. These Associates are entitled to prejudgment interest on such amounts at the rate of 10% per annum from December 31, 1982, to date of judgment.

5. Cascade, Rex Montis and Weston have failed and refused to provide to the Associates and Gold Technics Defendants a full, accurate and complete accounting as fiduciaries of the $800,000.00 development fund and interest entrusted to them as fiduciaries. The Defendant Associates, however, are not entitled to a further accounting for these funds or any payment by reason thereof because of their having been relieved of the burden of repayment of the development loan making up the development fund, nor are the Gold Technics Defendants entitled to a further accounting therefor since Cascade and Weston from their own funds or funds for which they are otherwise being held to account to the Telegraph Mine Joint Venture and Gold Technics, Ltd. recompensed and thus rendered immaterial the deficiencies in the development fund claimed by the Gold Technics Defendants to be unaccounted for.

6. Rex Montis converted for its own purposes Rex Montis stock belonging to Gold Technics, Ltd. for which the latter is entitled to judgment.

7. Gold Technics, Ltd., as party in interest to the

Telegraph Mine Joint Venture is entitled to judgment on the accounting to that joint venture in the additional sum of $62,947.46, together with the further sum of $5,000.00 as nominal damages for the wrongful frustration and de facto termination of the Joint Venture.

8. Interphase, Telegraph Mine Ltd., Cascade, Rex Montis and Gnolaum Unitrust were and are instrumentalities of Weston and Cascade and used by them for their own personal purposes and as their alter egos, and judgment should run against said alter egos jointly and severally.

9. To secure payment of the judgment awarded to the Defendant Associates for attorney's fees and costs, as well as return of assessments collected with interest, the Defendant Associates should be granted a lien on the following Telegraph Mine claims effective from December 30, 1980, subject only to the rights, if any, of non-parties who have acquired adverse interests in good faith and without notice:

Claim Name	U.S.B.L.M. Registration No.
Telegraph-No. 1-10 Telegraph Mill Site No. 1 - 4	CAMC No. 86293 - 86306
Agua Dulce No. 4 - 17	CAMC No. 86307 - 86320
Gold Dyke North, Gold Dyke South C Gold Dyke No. 1 - 9	No. 86246-86256
Cascade Gold Dyke No. 10 - 21 Telegraph No. 11 - 21 No. Telegraph, No. Telegraph, Agua Dulce No. 18 - 51	CAMC No. 98683 - 98743 No. 1 - 2

Situated in Sections 16, 17, 18, 19, 20; T. 15 No., R. 11 E.; San Bernardino Meridian, San Bernardino County, Latitude 35 23' Longitude 115 50' West at corner No. 2 of

South Telegraph Lode Mining claim. (See original 'Working Interest Agreement and sublease' in the following identified records: San Bernardino Co. File No. 81-072262).

Dated this 16th day of September, 1985.

A. Sherman Christensen
Senior United States District Judge

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS, ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

FINAL JUDGMENT
IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH CENTRAL DIVISION IN
CASCADE V. BANKS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
No. C-82-1223C

CASCADE ENERGY AND METALS CORPORATION,
a Nevada corporation,

Plaintiff,

v

JEFFERY G. BANKS, et al,

Defendants

JEFFERY G. BANKS, ET AL,

Counterclaimants, Cross-laimants, and
Cross-Counterdefendants,

vs.

CASCADE ENERGY AND METALS CORP.,

Counterdefendant and
Cross-Counterclaimant,

and

W. DAVID WESTON, ET AL,

Cross-Counterclaimants
and Cross -Defendants.

The Court having made and entered its final Findings of Fact and Conclusions of Law, in harmony therewith it is hereby ordered, adjudged and decreed:

1. The Interlocutory Judgment of the Court made and entered on April 15, 1985, is confirmed, hereby made a part of this final judgment and incorporated herein by reference, supplemented by the provisions that follow with specific reference to the resolution of the accounting and related issues reserved by the Interlocutory Judgment.

2. The Defendant Associated, except Harmatz, Hodowski, Waugh and Moses, shall have and recover judgment jointly and severally against Cascade Energy and Me-

tals Corporation, W. David Weston, Rex Montis Silver Company, Telegraph Mine Limited, Interphase Corporation, and James F. Peters, Trustee of the Gnolaum Unitrust, for the sum of $240,000.00, as attorney's fees, costs and expenses, and also for the amounts set opposite their respective names together with interest on those amounts from December 31, 1982, to the date of this Judgment at thy rate of 10% per annum, as restitution for assessments unlawfully collected from them:

Herbert W. Stoltenberg	$3,400.00
Jeffery G. Banks	1,000.00
Roger A. Mann	2000.00
David G. Henry	4,200.00
Delford Ashley	20,421.12
George and Patricia Slater	2,307.75
Robert Doub	9,231.00
Sam and Alyce Hambarian	9,258.31
Peter P. Samarin 5,000.00	
lionel Ascher	4,615.50
Harmatz & Hodowski	4,500.00
Chris Waugh 4,516.00	
	$70,449.68

3. Gold Technics, Ltd. shall have and recover judgment against Cascade Energy and Metals Corporation, W. David Weston, Rex Montis Silver Company, Telegraph Mine Limited, Interphase Corporation, and James F. Peters, Trustee of Gnolaum Unitrust for the sum of $62,947.46 as a further balance due upon this final accounting, together with nominal damages of $5,000.00 for the frustration and termination of the Telegraph Mine Joint Venture. Samuel Harmatz, Bernard Hodowski, H. E. Moses and Chris Waugh shall have and recover judgment against this for the additional sum of $25,000.00 as attorney's fees, costs and expenses as Associates in defending the bad-faith action of

Weston and Cascade.

4. To secure payment of the judgment hereby awarded to the Defendant Associates for attorney's fees and costs as well as for reimbursement of assessments, with interest, the Defendant Associates are hereby awarded a lien on the following described Telegraph Mine claims effective from December 31, 1980, subject only to the rights therein, if and, of non-parties who have acquired adverse interests in good faith and without notice.

Claim Name	U.S.B.L.M. Registration No.
Telegraph No. 1 - 10	CAMC No. 86293 - 86306
Telegraph Mill Site No. 1 - 4	
Agua Dulce No. 4 - 17	CAMC No. 86307 - 86320
Gold Dyke North, Gold Dyke South	CAMC No. 86246 - 86256
Gold Dyke No. 1 - 9	
Cascade Gold Dyke No. 10 - 21	CAMC No. 85683 - 98743
Telegraph No. 11 - 21	
No. Telegraph, No. Telegraph, No. 1 - 2	
Agua Dulce No. 18 - 51	

Situated in Sections 16, 17, 18, 19, 20; T. 15 No., R. 11 E.; San Bernardino Meridian, San Bernardino County, Latitude 35 23' Longitude 115 50' West at corner No. 2 of South Telegraph Lode Mining claim, (See original 'Working Interest Agreement and Sublease' in the following identified records: San Bernardino Co. File No. 81-072262.)

It is so ordered.

Let execution issue on this Judgment.

Dated this 16th day of September, 1985.

A. Sherman Christensen

Senior United States District Judge

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS, ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

ORDER AMENDING JUDGMENT
AND FINDING OF FACT
IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH CENTRAL DIVISION IN
CASCADE V. BANKS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
No. C-82-1223C

CASCADE ENERGY AND METALS CORPORATION,
a Nevada corporation,

Plaintiff,

v

JEFFERY G. BANKS, et al,

Defendants

JEFFERY G. BANKS, ET AL,

Counterclaimants, Cross-laimants, and
Cross-Counterdefendants,

vs.

CASCADE ENERGY AND METALS CORP.,

Counterdefendant and
Cross-Counterclaimant,

and

W. DAVID WESTON, ET AL,

Cross-Counterclaimants
and Cross -Defendants.

The Motion to Amend Judgment dated September 26, 1985, brought by the Gold Technics defendants came regularly for hearing before the Honorable A. Sherman Christensen, Judge of the above-entitled Court, on November 13, 1985. Lynn P. Heward appeared on behalf of the cross-defendants Rex Montis Silver Co. and Telegraph Mine, Ltd.; Delwin T. Pond appeared on behalf of cross-defendant James F. Peters, Trustee of Gnolaum Unitrust; Dennis F. Olsen of Olsen and Associates appeared on behalf of the Gold Technics defendants; and George M. Haley of Haley & Stolebarger appeared on behalf of the investor

defendants. Argument of counsel was presented and the Court being fully advised, it is hereby

ORDERED that:

1. Finding No. 35 of the Findings of Fact on Accounting and Related Phases of Case entered herein and dated September 16, 1985, is amended to include reference to the Gnolaum Unitrust in the first sentence thereof, such that that sentence reads as follows:

> Interphase, Gold Technics, Telegraph Mine, Ltd., Telegraph Mine Joint Venture, Cascade, Gnolaum Unitrust, and Rex Montis are instrumentalities of Weston which were and are used by Weston for his own personal purposes.

2. An additional paragraph is added to the final Judgment herein dated September 16, 1985, relating to the rights and interests of the Gold Technics defendants in Gold Technics, Ltd. and other entities and assets subject to this lawsuit as follows:

> 5. Gold Technics, Ltd. is terminated and dissolved and shall have no separate right against any of the entities herein, and the Gold Technics defendants will have no rights or interests in the Telegraph Mine Lease, nor in the Telegraph Mine Joint Venture, nor in Gold Technics, Ltd., nor against any other entity against which Judgment is entered herein except as specifically set forth below or elsewhere in this Judgment. Likewise, the Gold Technics defendants are hereby individually relieved of any and all liability with respect to the Telegraph Joint Venture and to Gold Technics, Ltd., and to any other entity against

whom this Judgment is entered. W. David Weston, Rex Montis Silver Co., and related entities are hereby ordered to transfer and convey to the Gold Technics defendants the corresponding number of shares of Rex Montis stock set forth below. Since Gold Technics, Ltd. is dissolved, the Gold Technics defendants will each have a monetary judgment in their favor in the amount set forth below as their share of the Judgment which would otherwise be entered in favor of Gold Technics, Ltd.

Name	Shares	Judgment
Sam Harmatz	34,000	$5,979.38
Bernard Hodowski	34,000	5,979.38
A. C. Nejedly	34,000	5,979.38
H. E. Moses	34,000	5,979.38
Chris Waugh	66,000	8,969.07
Estate of Joe F. Duncan	88,000	11,958.76
Elliot Weinberg	22,000	2,989.69

DATED this day of , 1985.

BY THE COURT:

A. SHERMAN CHRISTENSEN, Judge